COMMONWEALTH OF KENTUCKY
SUPREME COURT
FILE NO. 2013-SC-000560
COURT OF APPEALS FILE NO. 2012-CA-000598-MR

SHEILA PATTON, as Administratrix of the Estate of
STEPHEN LAWRENCE PATTON, Deceased — APPELLANT

v.

DAVIDA BICKFORD; PAUL FANNING; RONALD "SONNY" FENTRESS; JEREMY HALL; ANGELA MULLINS; LYNN HANDSHOE; and GREG NICHOLS — APPELLEES

BRIEF FOR APPELLANT, SHEILA PATTON, As Administratrix of the Estate of STEPHEN LAWRENCE PATTON, Deceased

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CERTIFICATE OF SERVICE

I hereby certify that copies of this brief were served upon the following named individuals by U.S. mail this 11th day of September, 2014: Michael J. Schmitt and Jonathan C. Shaw, Porter, Schmitt, Banks & Baldwin, 327 Main Street, P.O. Drawer 1767, Paintsville, Kentucky 41240-1767; Neal Smith, Smith, Thompson & Carter, PLLC, P.O. Box 1079, Pikeville, Kentucky 41502; Hon. John David Caudill, Judge, Floyd Circuit Court, Division II, 127 S. Lake Drive, 1st Floor, Suite 100, Prestonsburg, Kentucky 41653; and Hon. Samuel P. Givens, Kentucky Court of Appeals, 360 Democrat Drive, Frankfort, Kentucky 40601.

The undersigned does also certify that she has not removed the Certified Record on Appeal.

Vanessa B. Cantley
Counsel for Appellant

APPENDIX

Exhibit A	March 15, 2012 Findings of Fact, Conclusions of Law, Order and Judgment of the Floyd Circuit Court
Exhibit B	July 19, 2013 Opinion of Kentucky Court of Appeals
Exhibit C	Affidavit of Zack Shepherd, ACMS Student
Exhibit D	Affidavit of Phyllis Smith, ACMS Student
Exhibit E	Affidavit of Cody Ramey, ACMS Student
Exhibit F	Affidavit of Casey Ramey, ACMS Student
Exhibit G	Cadle v. Cornett, 2013 Ky. App. Unpub. LEXIS 574 (Ky. App. July 12, 2013)

INTRODUCTION

This is a negligence action against school administrators and teachers brought by the estate of a thirteen-year-old boy who committed suicide after suffering daily bullying, harassment and torment at school.

STATEMENT CONCERNING ORAL ARGUMENT

This case presents novel issues that have not been addressed by the Court, and the Appellant believes the Court would be assisted by Oral Argument.

STATEMENT OF POINTS AND AUTHORITIES

STATEMENT OF THE CASE

In August 2007, Stephen Patton ("Stephen") began his eighth grade school year at Allen Central Middle School ("ACMS"). He was thirteen years old. Despite being well-liked by the majority of his classmates, having a good-natured and cheerful personality, and treating others with respect, certain students repeatedly, continually, systematically, and intentionally assaulted, abused, harassed, menaced, taunted, hazed, threatened, teased and bullied the young boy. (Second Amended Complaint ¶¶ 11 and 13, Transcript of Record ("T.R."), pp. 230 and 231).

The constant harassment, bullying, and hazing created a hostile and abusive educational environment for Stephen and caused him to suffer both physically and mentally. (Second Amended Complaint ¶ 13, T.R. p. 231). On November 28, 2007, in order to escape the daily torment he faced from school bullies, Stephen placed a handgun to his head and took his own life. (Second Amended Complaint ¶ 18, T.R. 231).

Following Stephen's death, the Patton family immediately received word from students and adults that Stephen had been bullied daily at ACMS. Stephen had even expressed his desperation to another student, stating he had "to do something to stop" the bullying and torment. Devastatingly, that "something" was suicide. The Patton family retained counsel, and together they interviewed multiple students and adults who provided detailed information about the bullying Stephen was subjected to at ACMS and the systematic failure for years on the part of administrators and teachers to supervise the ACMS students and implement the district's anti-bullying policy, thereby causing Stephen's suffering as well as the suffering of other ACMS students like him.

The Appellant brought suit against ACMS administrators and teachers Davida Bickford, Paul Fanning, Ronald "Sonny" Fentress, Jeremy Hall, Angela Mullins, Lynn Handshoe and Greg Nichols (the "Appellees"), alleging they had actual knowledge, or in the exercise of due care should have known, of the harassment, bullying, and hazing of Stephen. (Second Amended Complaint ¶ 14, T.R. p.231). Because of the Appellees' professional training, they ***knew*** harassment, bullying, and hazing of this student would lead to his physical harm, depression, suicide, and/or other devastating consequences. In fact, more than two years before Stephen's death, Appellee Davida Bickford ("Ms. Bickford") sent her staff an email, a portion of which is reproduced below, specifically stating that one of the harms suffered by bullying victims was suicide:

> Often, psychologists say, gifted children who are bullied turn their rage and despair inward. Among them was J. Daniel Scruggs of Meriden, Conn., a slightly build 12-year-old with an IQ of 139.
>
> Scruggs was tormented for more than a year by middle school classmates who shoved him off the bleachers, affixed "Kick Me" signs to his back and made him eat his lunch off the cafeteria floor. Many school officials knew about the abuse and failed to intervene, state investigators found. On Jan. 2, 2002, the boy walked into his bedroom closet and hanged himself.

(Plaintiff's Response to Defendants' Motions for Summary Judgment (hereinafter "Response"), Exhibit 2, T.R. pp.742-936).

Despite documents and testimony supporting the Appellant's case, the trial court granted the Appellees' Motions for Summary Judgment on March 15, 2012. (March 15, 2012, Findings of Fact, Conclusions of Law, Order and Judgment, attached hereto as **Exhibit A**, T.R. pp.1198-1203). The Appellant thereafter filed an appeal to the Kentucky Court of Appeals, and on July 19, 2013 the Court of Appeals affirmed the Order of the

Floyd Circuit Court. (July 19, 2013 Opinion, attached hereto as **Exhibit B**, T.R. pp. 1171-1176).

The Court of Appeals affirmed the trial court's grant of summary judgment in favor of the Appellees on the basis that Stephen's act of suicide was an intervening and superseding act that cut off any potential liability. However, the Court of Appeals also held that the trial court erred as a matter of law by granting Respondents qualified official immunity. This Court then granted Appellant's motion for discretionary review addressing the issue of superseding, intervening causation. For the reasons set forth herein, the opinion of the Court of Appeals should be reversed and this case should be remanded to Floyd Circuit Court for a jury trial.

ARGUMENT

I. De Novo Review and Summary Judgment as an "Extraordinary Remedy"

This Court does not defer to any lower court's decision with regard to summary judgment. "Because summary judgments involve no fact finding, this Court will review the circuit court's decision de novo." 3D Enterprises Contracting Corp. v. Louisville & Jefferson Cnty. Metro. Sewer Dist., 174 S.W.3d 440, 445 (Ky. 2005).

On appeal, the record must be reviewed to determine whether the summary judgment movant affirmatively demonstrated the ***absence*** of any issue of fact in the circuit court. Steelvest, Inc. v. Scansteel Service Center, Inc., 807 S.W.2d 476, 482 (Ky. 1991). Therefore, the record must be viewed in the light most favorable to the nonmovant and all doubts resolved in the nonmoving party's favor. Commonwealth v. Whitworth, 74 S.W.3d 695, 698 (Ky. 2002); Lipsteuer v. CSX Transportation, Inc., 37 S.W.3d 732, 736 (Ky. 2000). "The inquiry should be whether, from the evidence of record, facts exist

which would make it possible for the nonmoving party to prevail." Welch v. American Publishing Co. of Kentucky, 3 S.W.3d 724, 730 (Ky. 1999). The court is also obliged to draw "all inferences in favor of the nonmovant." City of Paducah v. Moore, 662 S.W.2d 491, 494 (Ky. App. 1984).

Recently, this Court expressed a "recommitment to a very stringent standard for summary judgment in Steelvest and the rejection of the much more lenient federal standard." Shelton v. Kentucky Easter Seals Soc., Inc., 413 S.W.3d 901, 916 (2013). In so doing, this Court made clear that summary judgment in Kentucky is an "***extraordinary remedy***" because "***we should not fear jury determinations***." *Id.* at 905, 917(emphasis added); see also Dick's Sporting Goods, Inc. v. Webb, 413 S.W.3d 891, 894 (Ky. 2013).

Nor should a jury determination be feared in this case. The Appellees were negligent in their supervision of ACMS students and in implementing the district's bullying policies. The Appellees knew bullying could result in suicide, so it was certainly foreseeable. Moreover, a jury could reasonably determine that the Appellees' conduct was at least a substantial factor in bringing about Stephen's death.

Accordingly, numerous issues of material fact exist in this case, and the case is ripe for resolution by a jury.

II. The Appellant has Alleged Sufficient Facts to State a Negligence Claim Against the Appellees.

To establish a claim of negligence, a plaintiff must show that the defendant owed him a duty, that the duty was breached by defendant, that the plaintiff was directly and/or proximately harmed by the defendant's breach, and that the plaintiff suffered damages. In this case, the Appellees owed Stephen an affirmative duty to keep him safe, and they

breached that duty by failing to supervise him and his fellow students and to follow their own anti-bullying protocols. This breach proximately caused Stephen's suicide, a consequence that was foreseeable and not an intervening/ superseding act. Damages are undisputed.

A. The Appellees breached their affirmative duty to keep Stephen safe by failing to supervise ACMS students and failing to adequately follow the ACMS bullying policy.

The Appellees had an affirmative duty to supervise ACMS's students' behavior and to implement ACMS's bullying policy. Kentucky law has long recognized teachers' responsibility for the conduct of their students. See Carr v. Wright, 423 S.W.2d 521, 522 (Ky. 1968) ("A teacher is responsible for the discipline of his school, and for the progress, conduct, and deportment of his pupils. It is his duty to maintain good order and to require of his pupils a faithful performance of their duties.").

This Court has clearly held that "[t]he 'special relationship' thus formed between a school district and its students imposes an affirmative duty on the district, its faculty, and its administrators to take all reasonable steps to prevent foreseeable harm to its students." Williams v. Kentucky Dept. of Educ., 113 S.W.3d 145, 148 (Ky. 2003). As a student at ACMS, Stephen's teachers and school administrators had an affirmative duty to keep him safe while he was in their care at school. The Appellant has extensive evidence that the Appellees breached their affirmative duty to Stephen in disturbing ways and on numerous occasions.

1. Appellant's Expert Barbara Coloroso

Barbara Coloroso ("Ms. Coloroso") is an internationally best-selling author, and over the past thirty-eight years she has become an internationally recognized speaker and

consultant on parenting, teaching, school discipline, bullying, nonviolent conflict resolution, and restorative justice. She formed her opinions by looking at ACMS's bullying policy, the lack of incident reporting, e-mail records, the depositions of the Appellees, and her own extensive research on bullying.[1] (Response Exhibit 10, Deposition of Ms. Coloroso, pp. 10-11, 51, 59, 145-47, 149, 242-43, 245-46, 259, and 263-64, T.R. pp 823-824, 828, 830, 849-851, 853, 859-860, 862-863, 869, and 873-874).

Ms. Coloroso made several professional observations about ACMS as a school, its teachers, and its staff. Regarding ACMS, Ms. Coloroso found that the "climate that was created in that school was toxic, and that allowed the kids who targeted him [Stephen] to get away with it." (Response Exhibit 10, p. 122, T.R. p. 838). When asked if the Appellees recognized and tolerated bullying without addressing it, Ms. Coloroso answered "they didn't just call it bullying. They excused it. And you don't excuse, you don't make sarcastic comments." (Response Exhibit 10, p. 245, T.R. p.862). In Ms. Coloroso's expert opinion, a person cannot identify bullying if he or she cannot define it – a deficiency shared by all of the Appellees. (Response Exhibit 10, p. 59, T.R. p.830). Although the teachers and administrators claimed to have had bullying training, none of the Appellees could successfully classify an act as either bullying or not bullying when asked to do so. (Response Exhibit 10, pp. 114-15, T.R. pp. 832-833).

Ms. Coloroso's opinion that the Appellees breached their duty to implement the bullying policy is illustrated through direct and absolute evidence of policy violations. For example, Ms. Bickford failed to report the number of times disciplinary actions were

[1] Ms. Colorosa testified that she had spent ample time reviewing the evidence and forming the opinion provided during her deposition, but she wanted to hear testimony from relevant students and adults, under oath, in order to finalize her opinion for trial. (Response Exhibit 10, pp. 51, 246, 280-81, 290, 303-04, 313-14, and 320-21, T.R. pp. 828, 863, 881-882, 886, 895-896, 905-906, and 909-910). The Appellant is owed that opportunity, and the trial court's ruling should be reversed.

taken, which she was required to do by the district policy. (Response Exhibit 4, Deposition of Ms. Bickford, pp. 47-48, T.R. pp. 781-782). Additionally, ACMS failed to utilize surveys to check the bullying policy's effectiveness (Response Exhibit 10, Deposition of Ms. Coloroso, pp. 263-65 and 314-16, T.R. pp. 873-875 and 906-908), despite the requirement that surveys be used to gather data in the bullying policy in effect at that time. (Response Exhibit 12, T.R. pp. 802-804).

Ms. Coloroso detailed throughout her lengthy deposition how the information she was provided led her to conclude that the Appellees breached their duty to provide a safe and healthy school environment for Stephen. (Response Exhibit 10, T.R. pp. 823-910). This testimony alone should have been sufficient for the Appellant's case to survive the Appellees' Motions for Summary Judgment.

2. Appellant's Expert Dr. Susan Lipkins

Dr. Susan Lipkins is a nationally-renowned bullying expert and psychologist. In her opinion, the ACMS administration failed in the implementation of its bullying policy. First, there were no records that the administration in fact implemented the specific procedures they had outlined in their policy. (Response Exhibit 21, Deposition of Dr. Lipkins, p. 65, T.R. p.930). Although the policy required a reporting method for students, and ACMS utilized a "bully box," Dr. Lipkins could not discern who opened the box, how frequently it was opened, who read the report, and how the report was investigated. (Response Exhibit 21, pp. 72-74, T.R. p. 931). Dr. Lipkin noted a significant lack of training and implementation of programs, noting that "[t]he fact [Appellee] Mr. [Jeremy] Hall admits he had no training on bullying shows me that Ms. Bickford didn't train him and that the superintendent didn't have in place appropriate

training programs." (Response Exhibit 21, pp. 95, 156, T.R. pp. 932 and 936). Dr. Lipkins also points to ACMS's continued failure to implement their bullying policy through the Appellees' inadequate response to Stephen's suicide. (Response Exhibit 21, p. 134, T.R. p. 935). This testimony undeniably creates a genuine issue of material fact regarding the Appellees' breach, and the Court of Appeals' decision must be reversed.[2]

3. Appellee Davida Bickford

Ms. Bickford's lack of knowledge about her school's own bullying policy is clear from her deposition. She testified that ACMS has had a policy against bullying since 1999 (Response Exhibit 4, p. 46, T.R. p. 780), but the policy was not designed until the 2004-05 school year (Response Exhibit 13, Bullying Policy, p. 5, T.R. p. 809).[3] Ms. Bickford testified that she had not witnessed any bullying at ACMS, but she agreed that bullying behaviors occurred in every school. (Response Exhibit 4, pp. 15, 77, T.R. pp. 776 and 783). Significantly, an affidavit from a former classmate of Stephen (discussed below) shows that Ms. Bickford was absolutely aware of the bullying suffered by Stephen, but she chose not to pursue any remedy.

Performance evaluations for Ms. Bickford note her difficulties in effectively communicating with parents and her need to review school policies and procedures herself and with staff. (Response Exhibits 14 and 15, T.R. pp. 818-819). While Ms. Bickford testified that a bullying presentation is given to the students and staff of ACMS

[2] Expected testimony from the Appellees' expert, John Akers, highlights the reality that there are genuine issues of material facts at issue in this case, making summary judgment inappropriate. Much of Mr. Akers' expected testimony, based on Defendants' CR 26.02 expert disclosures, merely reiterates the tenets of the ACMS bullying policy, but he provides no examples of its successful implementation. The Appellant, on the other hand, has multiple examples of the policy's problematic implementation to present at trial.

[3] Significantly, the policy in place at the time of Stephen's death required incidents of bullying be reported periodically with evidence of progress the school has made towards reducing reoccurrence. (Response Exhibit 13, p. 2, T.R. p. 806). However, despite the Appellant's request for these records, none were ever received, despite known reports of bullying in ACMS's STI software system.

at the start of every school year, she admitted that, as school principal, she had never watched one of these presentations. (Deposition of Davida Bickford, p. 23, T.R.-Deposition Included Separately). While ACMS's hallway cameras might have provided some documentation of incidents of bullying, Ms. Bickford testified that the persons in charge of monitoring the cameras (the secretaries) were never trained on how to recognize bullying. (Response Exhibit 13, p. 8, T.R. pp. 812; Response Exhibit 4, pp. 110-11, T.R pp. 784-785). This testimony and numerous inconsistencies in Ms. Bickford's positions create a sufficient genuine issue of material fact regarding her negligence such that summary judgment was inappropriately granted

4. Testimony of students

As set forth above, after the Patton family retained counsel, they interviewed multiple students who provided detailed information about the bullying Stephen suffered at ACMS and the disturbing failure of ACMS teachers and administrators to supervise the students or implement the district's bullying policy.

a. Zack Shepherd

Zack Shepherd ("Zack") personally witnessed the bullying of Stephen at ACMS, particularly during lunch time when students would steal items out of Stephen's lunch box and then scatter the remainder. (Zack Shepherd Affidavit, attached hereto as **Exhibit C**, T.R. pp. 1153-1155). In order to avoid this torment, eventually Stephen simply set out his lunch box, left for a few minutes while the bullies did their work, and then returned when they were done. Id. According to Zack, the ACMS teachers did not pay attention to what was happening among the students during lunch. Id. On two separate occasions, Zack, Stephen, and a third boy went to Ms. Bickford to tell her about Stephen's bullying.

Id. Rather than take the matter seriously, Ms. Bickford "blew us [the boys] off and ignored our concerns when we informed her of how Stephen was being bullied. She acted like it was not a big deal and did not say she would do anything about the bullying." Id. Zack's affidavit raises definitive factual questions about ACMS's officials' complete failure to supervise students and the adequacy of ACMS's implementation of its bullying policy.

b. Phyllis Smith

Like Stephen, Phyllis Smith ("Phyllis") was a target of bullies at ACMS. (Phyllis Smith Affidavit, attached hereto as **Exhibit D**, T.R. pp. 1166-1168). Phyllis was once a good student, but when she started being bullied about her weight, her grades dropped, she became stressed out and nervous, and she experience physical symptoms like nausea and headaches. Id. She would frequently leave school early to escape the bullying, and she often saw Stephen checking out at the same time and for the same reasons. Id. Phyllis actually told Appellee Gregory Nichols about the bullying, and though he said he would do something, he never did. Id. In the lunchroom, students would throw food at her and put gum and barbecue sauce in her hair; Appellee Patricia Handshoe actually picked the gum out of Phyllis's hair once but did nothing to punish the girls who put it there. Id. The teachers rarely took notice of what the students were doing to each other in the lunchroom. Id. In the hallways, Phyllis watched as students made fun of Stephen's stutter – right in front of teachers – but the teachers did nothing. Id. Phyllis's personal experiences, and what she observed Stephen endure, demonstrate clearly the lack of student supervision and effective implementation of ACMS's bullying policies by Appellees.

c. Cody Ramey

Cody Ramey ("Cody"), a bullying victim himself, had every class with Stephen during eighth grade, and he personally witnessed other students bullying Stephen on a daily basis. (Cody Ramey Affidavit, attached hereto as **Exhibit E**, T.R. pp.1156-1159). When a family member informed Appellee Patricia Handshoe about the bullying Cody was suffering at the hands of a female student, Ms. Handshoe told Cody that the girl was just trying to flirt with him and acted like the bullying was no big deal. Id. Cody witnessed students verbally bully Stephen about his speech problems and height, and he saw students physically bully Stephen as well. Id. While Appellee Gregory Nichols lingered in the hallway, a student jumped on Stephen's back, with his arms wrapped around Stephen's neck. Id. According to Cody, many ACMS teachers remain in the hallways after the bell has rung and often get on their computers once assignments have been passed out, rather than supervising their students. Id. During one of Appellee Gregory Nichols's classes, he put a video on for the students to watch; instead, the students flicked peanut butter on the ceiling and doorknob, threw paper towels around the room, and put food coloring on the floor. Id. Mr. Nichols, consumed with his computer activities, did not notice anything going on until the end of glass when he grabbed the peanut butter-covered doorknob. Id. Clearly, ACMS teachers failed to supervise their students and did not take bullying seriously.

d. Casey Ramey

Like his brother, Cody, Casey Ramey ("Casey") was a victim of bullying at ACMS who also witnessed the daily bullying of Stephen by his peers. (Casey Ramey Affidavit, attached hereto as **Exhibit F**, T.R. pp. 1160-1162). Casey specifically saw

Stephen bullied in Appellee Angela Mullins's class. Id. In his affidavit, Casey verifies the "piggy back" attack and the "peanut butter" episode. Like all of the other students, Casey does not believe that the issue of bullying was taken seriously by the teachers and administrators at ACMS.

In an e-mail from a student produced by the Appellees, the student expresses her feelings of sadness for making fun of Stephen "big time." (Response Exhibit 16, T.R. pp. 820-822). Moreover, students will testify that Stephen made statements regarding his impending suicide that a reasonable juror could attribute to bullying. Ms. Coloroso's expert testimony will establish that middle school students do not fabricate such allegations. (Response Exhibit 10, p. 130, T.R. p. 840). The testimony of Stephen's classmates, and others in a position to observe how ACMS staff and administration handled issues of bullying and harassment at ACMS (or in many instances, did not handle at all), conclusively establishes that the Appellees breached their duties to their students to keep them safe from harm. There was a complete failure to supervise students and to follow through with the provisions of the bullying policy. Therefore, the trial court's grant of summary judgment must be reversed.

5. The trial court failed to consider the evidence in a light most favorable to the Appellant.

In its Order granting the Appellees' Motions for Summary Judgment, as well as the Court of Appeals' Opinion affirming that decision, neither court considered the wealth of evidence presented by the Appellant, only a portion of which is discussed above, that contradicted evidence provided by the Appellees. In fact, the trial court found:

> The proof in this case reveals that the district had adopted a bullying policy, that a policy was adopted at the school level, that action was taken to educate the students and employees about the policy, that there were remedial steps taken by placing posters, having a bullying box, and presentation of programs geared towards both faculty and staff. The record contains well documented efforts to identify potential bullies, educate students and staff, and otherwise demonstrate and enforce expectations for student behavior.

(**Exhibit A**, p. 2, T.R. p. 1199). This conclusion can only be justified if the trial court improperly viewed the evidence in a light most favorable to *the Appellees*. The record is rife with examples of the Appellees' failures to supervise ACMS students or implement the district's bullying policies, and these factual disputes are exactly the type of questions best left to a jury. As such, the trial court should not have granted the Appellees' Motions for Summary Judgment, and the ruling of the Court of Appeals must be reversed.

B. The Appellees' acts, omissions, and decisions directly and proximately caused Stephen's suicide, and Stephen's suicide was not a superseding and intervening cause.

Whether a plaintiff's injuries were caused by the tort defendant typically "should be left to the jury to determine." Eichstadt v. Underwood, 337 S.W.2d 684, 686 (Ky.1960) (reviewing denial of defendant's directed verdict motion). For causation, Kentucky has adopted the standard set forth in the Restatement (Second) of Torts § 431 (1965), which provides:

> The actor's negligent conduct is a legal cause of harm to another if
>
> (a) his conduct is a ***substantial factor in bringing about the harm***, and

> (b) there is no rule of law relieving the actor from liability because of the manner in which his negligence has resulted in the harm.

See, e.g. CertainTeed Corp. v. Dexter, 330 S.W.3d 64, 77 (Ky. 2010); Deutsch v. Shein, 597 S.W.2d 141, 144 (Ky.1980); Claycomb v. Howard, 493 S.W.2d 714, 718 (Ky.1973).

Here, a jury could reasonably find that Appellees supervision, conduct, and failure to act, was at least a "substantial factor" in bringing about Stephen's death. The question then becomes whether a "rule of law" relieves Appellees of liability. The Court of Appeals believed the doctrine of superseding causation cut off Appellees liability. But that is incorrect.

Under current Kentucky law, no superseding or intervening cause exists between the Appellees' breach of their duties and Stephen's death. "If resultant injury is reasonably foreseeable from the view of the original actor, then other factors causing to bring about injury are not a superseding cause for purposes of a negligence action." Williams v. Kentucky Department of Education, 113 S.W.3d 145, 151 (Ky. 2003). "The basic premise of a superseding cause is that it is 'extraordinary and unforeseeable.'" House v. Kellerman, 519 S.W.2d 380, 383 (Ky. App. 1974).

The Appellees argue that suicide is an unforeseeable, intervening act that cuts off the Appellees' liability, a position adopted by the trial court. Citing a fifty year-old case out of Illinois, the trial court stated that "Generally speaking, it has been said, the act of suicide is viewed as 'an independent intervening act which the original tortfeasor could not have reasonably [been] expected to foresee." (Exhibit A, p. 2, T.R. p. 1199) quoting Stasiof v. Chicago Hoist & Body Co., 200 N.E.2d 88, 92 (Ill. App. 1st Dist. 1964)). First,

Stansiof is completely distinguishable from the case at bar. Stansiof involved an attempted suicide alleged to be the result of physical injuries caused by the defendant five years prior to the attempt. Unlike the plaintiff in Stansiof, Stephen committed suicide in the midst of constant bullying while still a student under the daily supervision of the Appellees. Stephen's suicide was nowhere near as attenuated from the Appellees' negligence as that in Stansiof. The case is simply not on point in addition to it not being binding precedent.

Second, the trial court, as well as the Court of Appeals, base their decisions on the assumption that Kentucky has adopted a "general rule" regarding suicide being an intervening act, and that a plaintiff's suicide must fit into one of three "exceptions" in order to be actionable in Kentucky. (Exhibit A, pp. 2-3, T.R. pp. 1199-1200; Exhibit B, p. 8). To the contrary, this Court has never adopted or even addressed this supposed general rule, and the decisions relied upon by the lower courts in this case do not control the issue before the Court. Kentucky has not carved out specific exceptions to this general rule. Kentucky courts have merely recognized certain situations where a person's suicide does not foreclose an action against the defendant for negligence, but that is a far cry from then concluding these are the *only* exceptions. Stephen was not required to fit into any specific exception to the supposed general rule, if such a rule even exists in Kentucky.

Further, the courts have recognized two situations where a person's suicide *does not* foreclose an action against the defendant whose negligence may have led to the death. In Sudderth v. White, 621 S.W.2d 33 (Ky. App. 1981), the Kentucky Court of Appeals held that when a jailer or other custodian negligently fails to properly guard against a

known suicidal person's attempts to kill himself, the suicide may be considered a direct consequence of the custodian's breach of duty. In Wells v. Harrell, 714 S.W.2d 498 (Ky. App. 1986), the Kentucky Court of Appeals held that the suicide of a person with a mental disorder caused by an injury sustained at work can be compensable under the Kentucky Workers' Compensation Act.

The trial court tried to distinguish Suddeth and Wells by proclaiming that "[t]he facts in this matter demonstrate that the suicide of Stephen Patton does not come within any recognized exception to the general rule. The record is also clear that Stephen was not known to be suicidal." (Exhibit A, p. 3, T.R. p. 1200). The Court of Appeals cited to a 1990 opinion from the Sixth Circuit, Watters v. TSR, Inc., 904, F.2d 378, 383-84 (6th Cir. 1990), which also relied upon the fifty year-old Stasiof decision, to merely rubber stamp the trial court's holding, stating: "Here, the trial court correctly found that Stephen's act of suicide did not fall within any of the recognized exceptions." (Exhibit B, p. 9).[4] Respectfully, the trial court and the Court of Appeals are simply incorrect. As previously noted, Kentucky has not adopted the "general rule" on suicide, and there is no legal requirement that a suicide fit into any "exception" in order to be considered foreseeable. Neither the trial court, nor the Court of Appeals, cite binding authority for

[4] The Appellant wishes to note a recurring theme in Appellees' briefs, and now present in the Court of Appeals' decision, which merits some comment. When the case was briefed before the trial court and the Court of Appeals, the Appellees were quick to point out, "[I]f Stephen's suicide was not foreseeable to his own mother, there is no reason to suppose that it was foreseeable to the named Appellees." (Appellant's Court of Appeals Brief, p. 11). The Court of Appeals itself mirrored this argument, stating "It does not appear from the record that anyone was aware that Stephen was suicidal, especially considering that his friends and parents were shocked by the tragic incident." (Exhibit B, p. 9). Putting aside the fact that there is direct evidence in the form of numerous affidavits from Stephen's classmates which contradict the contention there is nothing in the record "that anyone was aware that Stephen was suicidal," and, in doing so, creates a disputed issue of fact for which summary judgment was improperly granted, perhaps the larger takeaway here is the implication or suggestion that the case of negligence actually hinges on Stephen's grieving parents. To imply that it was his parents' notice, *their* foreseeability that should govern the analysis in this case, versus the record evidence before the Court replete with instances of Appellees' notice of the torment Stephen was made to endure—to say nothing of their freely given admission that suicide is a foreseeable risk of such torment— is as insensitive as it is absurd. (Response Exhibit 4, p. 46, T.R. p. 780).

this position, when in reality Kentucky has not adopted any "rule," much less any "general rule" regarding the foreseeability of suicide. Also, the Appellant has presented evidence showing that Stephen *was* known to be suicidal, which creates a factual dispute that is best resolved by a jury. Finally, Stephen's case is incredibly analogous to the fact situations in both Sudderth and Wells. Like the custodians in Sudderth, teachers and administrators have a "special relationship" with their students that impose on them an affirmative duty of care. The custodians' failure to adequately protect the plaintiff from harm in Sudderth is the same kind of failure by the Appellees to protect Stephen from the harassment and bullying he suffered at school and that lead to his suicide. In Wells, the plaintiff would not have committed suicide but for the mental disorder caused by his workplace injury. In this case, Stephen would not have committed suicide *but for* the mental and emotional injuries he suffered at school due to the daily bullying that went unchecked by the Appellees.

Significantly, when Stephen's mother recognized that something was wrong with her son, she reached out to his teachers through the following e-mail:

> I'm Sheila Patton, Stephen's mom, he's not feeling well today and won't be attending school, he has a slight fever and headache, I think he may have some sort of virus. We're going to see his doctor today.
>
> My "Mommy Guts" tells me Stephen is either going through some sort of stage or something is wrong at school because even though I know he's not feeling well, some of the things he says and some of his actions tell me he does not want to come to school. Do you know of anything that's going on with him? I realize tomorrow is the day report cards come out and I also realize he probably has a not so good grade in writing and he's dreading bringing that report card home as I warned him that he would lose something he really likes to do if the grade did not improve. I just can't feel like that's the problem.
>
> Please reply to this e-mail or call me . . . if you do or do not know of anything that's bothering Stephen. He says the crying baby dolls gets on

> his nerves but that's all he will talk about. I remember when I was 12 years old, things that I would consider now to be so insignificant was so important.

(Response Exhibit 3, E-mail from Sheila Patton, T.R. p. 775). In response, Stephen's mother only received reassurances from the Appellees that everything was fine with her son, reassurances that can only seem hollow at this point. (Response Exhibit 3, T.R. p. 775).

Further, the Appellant has presented sufficient evidence to establish that Ms. Bickford and the teachers and staff at ACMS routinely had student supervision problems. As expressed in a March 26, 2007, email sent by Ms. Bickford, ACMS teachers failed to supervise students on break, and a substitute had to take students to the office for throwing water. (Response Exhibit 5, T.R. pp. 788-789). Just a month later, Ms. Bickford sent an email to the entire staff stating that teachers were giving students too much freedom and that the students were unable to handle said freedom. (Response Exhibit 6, T.R. p. 790). The jury can easily infer from these e-mails that ACMS teachers were not properly supervising students. Of course, no inference is necessary when reading the affidavits of Stephen's former classmates – the complete lack of supervision by ACMS teachers is there in black and white. In October 2007, the month before Stephen's death, Ms. Bickford again chastised her staff for failing to properly supervise students, this time because teachers were neglecting to pick up their students from the lunch room (a place where Stephen was repeatedly and mercilessly bullied). (Response Exhibit 7, T.R. p. 791; Exhibits C – F, T.R. pp. 1153-1168). Even after Stephen's passing, the Appellees failed to improve their supervision and regulation of student behavior. The problem became so severe that Ms. Bickford found it necessary to file a

corrective action plan on Appellee Greg Nichols in May 2008. (Response Exhibit 8, T.R. pp. 792-794).

The Appellees were informed two years prior to Stephen's death that bullying victims could commit suicide. (Response Exhibit 2, T.R. pp. 771-774). Moreover, Ms. Bickford herself admitted in her deposition that she believes and acknowledges that suicide is a foreseeable risk of bullying.

Q: Are you aware that suicide is a foreseeable risk of bullying?

A: Yes.

(Response Exhibit 4, p. 46, T.R. p. 780). The Appellees cannot now claim that Stephen's suicide was a superseding cause. Informational e-mails related to bullying sent by Ms. Bickford to her staff, along with her own deposition testimony quite clearly establish that Stephen's suicide was foreseeable.

"If resultant injury is reasonably foreseeable from the view of the original actor, then other factors causing to bring about injury are not a superseding cause for purposes of a negligence action." Williams v. Kentucky Department of Education, 113 S.W.3d 145, 151 (Ky. 2003). An intervening cause is one of such "extraordinary rather than normal, or highly extraordinary, nature, unforeseeable in character, as to relieve the original wrongdoer of liability to the ultimate victim. Id. (quoting House v. Kellerman, supra at 382).

Stephen's suicide was not an intervening or superseding act because it was a reasonably foreseeable consequence of Appellees' negligence. The Appellees failed to supervise the ACMS students and implement the district's anti-bullying policy, thereby causing Stephen's suffering and eventually his death. Suicide is a well-known risk of

bullying. In fact, authors Neil Marr and Tim Field coined the term "bullycide" in their 2001 book, *Bullycide: Death at Playtime*, referring to suicide caused by the victim having been bullied. Moreover, Appellees were aware that suicide is a common risk of bullying, a foreseeable result of bullying. Two years prior to Stephen's death, Ms. Bickford sent her staff an email specifically warning that one of the harms suffered by bullying victims was suicide. Indeed, Ms. Bickford testified in her own deposition that suicide is a foreseeable risk of bullying.

Additionally, the Kentucky General Assembly has recognized that suicide is a foreseeable risk of bullying. Recently, Kentucky enacted legislation that acknowledges the seriousness of bullying and makes an effort to educate students and educators about suicide prevention. Senate Bill 65 amended KRS § 158.070 to require all middle and high school principals, guidance counselors, and teachers to complete a minimum of two hours of self-study review of suicide prevention materials each school year. House Bill 51 amended KRS § 156.095 to require the Cabinet for Health and Family Services to post suicide prevention awareness and training information on its webpage and requires every public middle and high school administrator to disseminate suicide prevention awareness information to all middle and high school students each year.

Furthermore, the Kentucky Department of Education has an entire page on its website devoted to Bullying and Harassment.[5] That page also has a link to a Suicide Prevention and Awareness page, where it states that suicide is the second leading cause of death for youth and young adults in Kentucky. The Bullying and Harassment page also has a link to Frequently Asked Questions about Bullying. This page specifically states that "[k]ids who are bullied may be at a higher risk of suicide."

[5] See http://education.ky.gov/school/sdfs/pages/bullying.aspx.

The Appellees, the Kentucky General Assembly, and the Kentucky Department of Education recognize that suicide is a foreseeable risk of bullying. Stephen's act of suicide is not an intervening or superseding act so highly extraordinary in nature that it cuts off all liability, and thus Appellees can be liable for their negligence. The ruling of the Court of Appeals should be reversed.

III. Even if Suicide is Generally Considered an Intervening and Superseding Act, an Exception Should Be Made for Student Bullying Suicide.

As outlined above, Kentucky has adopted public policy designed to protect student victims of bullying and raise awareness on suicide prevention. Indeed, Kentucky now ***statutorily*** recognizes that suicide is a foreseeable risk of bullying. Moreover, Kentucky has acknowledged the importance of educators in preventing bullying and its devastating consequences. Thus, the Court should follow the General Assembly's lead and hold that an act of suicide committed by a bullied student is an exception to the general rule – if such a general rule exists in Kentucky – and does not cut off all liability for school administrators' and teachers' negligence under the doctrine of intervening and superseding causation. This will ensure that our educators take a more proactive response to school bullying and intervene before it is too late.

Finally, as stated above, Stephen's case is analogous to the fact situations in two other cases where Kentucky courts have recognized a person's suicide does not foreclose an action against the defendant for negligence (the so-called "exceptions" that the trial court and Court of Appeals referred to). Like the custodians in Sudderth, supra, teachers and administrators have a "special relationship" with their students that imposes on them an affirmative duty of care. The custodians' failure to adequately protect the plaintiff from harm in Sudderth is precisely the type of failure to protect Stephen from the

harassment and bullying he suffered at school that lead to his suicide. In Wells, supra, the plaintiff would not have committed suicide but for the mental disorder caused by his workplace injury. In this case, Stephen would not have committed suicide but for the mental and emotional injuries he suffered at school due to the daily bullying that went unchecked by any of the Appellees.

The Court of Appeals, however, stated: "[W]hen Stephen committed suicide in his home he was not in the direct care of Appellees. The custodial duty owed by teachers and administrators to care for students does not extend to their homes." (Exhibit B, p. 9)(citing Yanero v. Davis, 65 S.W.3d 510, 529 (Ky. 2001)). First, Yanero does not stand for such a proposition. Nowhere in Yanero did this Court indicate that the negligence of a party upon another (who is in the former's care and custody) somehow ceases or "stops at the door" if the foreseeable result of that negligence, the culmination of merciless torment, occurs in a different setting. That is an unworkable extension of the custodial duty. But maybe more importantly, the Court of Appeals' argument is a distinction without any meaning. Proximate causation, in this context, does not concern itself with the physical location of where the suicide occurred. Proximate causation concerns itself with the fact that it *occurred*; and, having occurred, asking whether it was foreseeable to the tortfeasor.

Again, at least according to Ms. Bickford, it was.

Q: Are you aware that suicide is a foreseeable risk of bullying?

A: Yes.

(Response Exhibit 4, p. 46, T.R. p. 780).

The Appellant recognizes that not every case where a student is bullied or ultimately commits suicide will result in a viable cause of action against school administrators and teachers. Bullying victims and/or their estates still have the burden of proof and must establish negligence on the part of administrators or teachers before any liability can attach. Appellant only requests the Court find that suicide is not a total bar to recovery in situations where a student commits suicide due to bullying that occurred at school, and reverse the Court of Appeals accordingly.

IV. The Antiquated Doctrine of Superseding Causation is Incompatible with Modern Tort Principles.

Finally, Appellant submits that the antiquated doctrine of superseding causation is incompatible with modern tort principles for the reasons set forth by Judge Nickell in his dissenting opinion in the companion case this Court accepted for discretionary review on the same day, Cadle v. Cornett, 2013 Ky. App. Unpub. LEXIS 574, at *38-41 (Ky. App. July 12, 2013)(Nickell, J., dissenting)(copy attached).

Judge Nickell's dissent persuasively expressed the logical trend in Kentucky law, a trend bending away from the doctrine of superseding causation and toward modern tort principles:

> Our Kentucky Supreme Court might wish to avail itself of this opportunity to clarify its position regarding the validity of the superseding cause doctrine in light of our adoption of pure comparative fault . . . Babbitt, together with Pile, point to the significantly diminished importance of the superseding cause doctrine following Kentucky's adoption of pure comparative fault. The clear trend is toward jury resolution of issues involving the relative fault of parties and other extrinsic factors which contributed to the ultimate results of the parties' course of conduct in a given instance. Because genuine issues of material fact remained with respect to whether Cornett was liable for the death and injuries suffered by the Cadles, the trial court erred in holding Cornett's negligence was excused as a matter of law pursuant to the superseding cause doctrine and in granting summary judgment.

See also Commonwealth v. Babbitt, 172 S.W.3d 786, 793 (Ky. 2005)("[T]he rationale for the doctrine of superseding cause has been substantially diminished by the adoption of comparative negligence"); Pile v. City of Brandenburg, 215 S.W.3d 36, 42 (Ky. 2006)(reiterating and adopting the Court's earlier holding in Babbitt concerning the doctrine's continuing incompatibility in light of comparative negligence).

Prior to 1984, Kentucky followed the doctrine of contributory negligence, an "all or nothing" doctrine—like the doctrine of intervening and superseding causation— that bar a plaintiff from recovering in negligence if the plaintiff contributed, in any way, to his injuries. In 1984 Kentucky adopted the "pure" form of comparative fault. Hilen v. Hays, 673 S.W.2d 713, 714-715 (Ky. 1984). Four years later, the Kentucky General Assembly enacted KRS § 411.182, codifying allocation of fault in all tort actions.

More recently, and again using comparative negligence as the legal backdrop, Kentucky all but eliminated another long-standing, yet obsolete tort principle: the open and obvious doctrine. In Kentucky River Medical Center v. McIntosh, 319 S.W.3d 385 (Ky. 2010), the Supreme Court of Kentucky ruled the open and obvious doctrine is largely diminished in the era of comparative fault:

> The incompatibility between the open and obvious doctrine as an absolute, automatic bar to recovery and comparative fault is great. So great, in fact, that a few states have held that their comparative negligence statutes abolished the open and obvious doctrine outright. The incompatibility between the traditional open and obvious rule and comparative fault is palpable; any incompatibility should be resolved in favor of comparative fault.

Id. at 391.

Then, in a pair of cases decided last year, this Court further limited, if not abolished in most instances, the open and obvious doctrine in light of Kentucky's

adoption of pure comparative fault. See Dick's Sporting Goods, Inc. v. Webb, 413 S.W.3d 891 (Ky. 2013); Shelton v. Ky. Easter Seals Soc'y, Inc., 413 S.W.3d 901 (Ky. 2013). Specifically, this Court ruled:

> The adoption of comparative negligence in the seminal case of Hilen v. Hays did not alter the requisite elements of a prima facie negligence claim. As a result of the holding in Hilen v. Hays, Kentucky became a pure comparative-fault state; but under comparative fault a plaintiff must still prove the defendant owed a duty to the plaintiff, breached that duty, and consequent injury followed. The evolution from contributory negligence to comparative fault focused on the method in which fault is allocated but did not alter the substantive law surrounding what duties are owed by a defendant. Comparative fault did alter the status of the plaintiff because the plaintiff may now recover despite being partially at fault for his injuries. With that evolutionary process firmly in mind, this Court can no longer perpetuate the flawed methodology that lingers in our conventional application of the open-and-obvious doctrine.

Shelton, supra at 906.

Abolishing the doctrine of intervening and superseding causation as an illogical, confusing vestige in the age of comparative fault, is the next logical step in what has been an on-going evolution of Kentucky jurisprudence in favor of comparative fault principles. This is not a novel concept by any means. Like Kentucky, many other jurisdictions have consistently stripped away their outdated legal doctrines in light of comparative fault, and a few have begun taking that next step by dismantling their respective intervening and superseding doctrines all together. The Appellant submits these decisions provide valuable guidance.

For example, in Torres v. El Paso Electric Co., 987 P.2d 386 (N.M. 1999)(overruled on other grounds), a plaintiff was injured when he came into contact with a power line while replacing the roof of his employer's building. In the negligence action brought by the plaintiff against the electric company, the defendant claimed that

the actions of the plaintiff, the plaintiff's employer, and various other electrical contractors, constituted a superseding cause of the plaintiff's injuries that relieved the defendant of any liability. The jury ultimately determined that, although the defendant was negligent, its negligence was not the proximate cause of the plaintiff's injuries.

The New Mexico Supreme Court began its analysis of the plaintiff's appeal by explaining that New Mexico previously had adopted a pure comparative negligence system and, as a natural corollary, subsequently had abolished joint and several liability. The court went on to state that, prior to the adoption of comparative negligence, courts had used the doctrine of intervening and superseding cause to avoid the contributory negligence bar that some deemed to be unfair. The court determined that this application of the doctrine of superseding cause was inconsistent with New Mexico's comparative fault laws. Moreover, when analyzing the doctrine, the court appropriately stated: "A finding of an independent [superseding] cause represents a finding against the plaintiff on proximate cause or, in other words, a finding that the defendant's act or omission did not, in a natural and continuous sequence, produce the injury." Id. at 736. Thus, the court determined that, the doctrine was no longer appropriate in cases where the defendant alleged that the plaintiff's negligence superseded its own liability, because the use of the doctrine created an unacceptable risk that the jury would inadvertently apply the common-law rule of contributory negligence. Id.

Additionally, with respect to cases in which the intervening and superseding cause doctrine is used by defendants to attempt to shift their fault to other intervening tortfeasors, the New Mexico Supreme Court also concluded that the doctrine would "unduly emphasize the conduct of one tortfeasor over another and would potentially

conflict with the jury's duty to apportion fault." Id. at 737. Since the issue of intervening and superseding cause adds a complex layer of analysis to the jury's determination of proximate cause, the appropriate analysis is merely that of proximate cause. Id. at 738. Finally, the court concluded that, "consistent with our prior cases discussing the effect of comparative negligence on traditional negligence principles, we believe that the instruction on [superseding] cause is sufficiently repetitive of the instruction on proximate cause and the task of apportioning fault that any potential for jury confusion and misdirection outweighs its usefulness." Id. Ultimately, New Mexico's doctrine of intervening and superseding causation was abolished.

In Control Techniques, Inc. v. Johnson, 762 N.E.2d 104 (Ind. 2002), the Indiana Supreme Court analyzed the relationship between that state's comparative fault act and the doctrine of intervening and superseding cause. In Control Techniques, Inc., the plaintiff sustained serious injuries while measuring the voltage of a circuit breaker. The jury allocated 5 percent of the fault to the defendant. On appeal, the defendant contended that the negligence of another company that had installed the circuit breaker constituted a superseding cause of the accident and foreclosed any liability on its part for defective design and manufacture. After an analysis of Indiana's common law doctrine of intervening and superseding cause, the Indiana Supreme Court concluded that the doctrines of causation and foreseeability impose the *same* limitations on liability as the intervening and superseding cause doctrine. Id. at 108. As the court noted: "Causation limits a negligent actor's liability to foreseeable consequences. A superseding cause is, by definition, one that is not reasonably foreseeable. As a result, the doctrine in today's world adds nothing to the requirement of foreseeability that is not already inherent in the

requirement of causation." Id. The court concluded that it was proper for the trial court to instruct only on proximate causation since the substance of the doctrine of intervening and superseding causation was fully explained in the instruction on proximate cause. Id. at 110.

In Potter v. Ford Motor Co., 213 S.W.3d 264 (Tenn. App. 2006), a plaintiff was injured while traveling on a rain-slick road at a moderate speed after losing control of her car which spun around and crashed into a tree. Her seat back collapsed into the rear seat and her spinal cord was severed. The jury found the defendant car manufacturer 70% at fault, and the driver 30% at fault. The manufacturer appealed. On appeal, the manufacturer (Ford) argued that it was error for the trial court to refuse to instruct the jury on the intervening cause doctrine. Ford's position was that the jury should have been allowed to consider whether plaintiff's own admittedly negligent conduct in losing control of her car was an independent, intervening cause of her injuries, such that it superseded Ford's negligence. Plaintiff countered that that all of the issues that were pertinent and relevant to the case were correctly submitted to the jury under the comparative negligence analysis and accompanying instruction, including issues of proximate cause and foreseeability. Plaintiff argued that in such a case as this, where the alleged intervening cause is the plaintiff herself, the application of the intervening and superseding cause doctrine, in *addition* to the comparative negligence doctrine, "is at best unnecessarily duplicative, and at worst an invitation to confusion and error." Id. at 273.

The Tennessee Court of Appeals agreed and held an intervening cause was not present in this case because only the conduct of plaintiff and defendant was to be

considered - not the conduct of a third party.[6] "Accordingly, a jury instruction on intervening cause was not necessary and, if given, would have been error." Id.

In Barry v. Quality Steel Prods., 820 A.2d 258 (Conn. 2003), plaintiffs, who brought a products liability action against defendants, a manufacturer and a seller, for allegedly defective roof brackets, appealed the judgment of the trial court which had submitted a superseding cause instruction to the jury, who found in favor of the manufacturer. The jury's interrogatories asserted two possible sources of a superseding cause: the employer's failure to provide additional fall protection for the injured parties, and the use of the incorrect nails to attach the roof brackets to the roof. On appeal, the Supreme Court of Connecticut held the doctrine of intervening and superseding cause should not have been presented to the jury, and that the doctrine no longer played a useful role in Connecticut's common law of proximate cause.

More specifically, the court held:

> We take this opportunity to clarify our approach to the doctrine of superseding cause and its continuing validity in our tort jurisprudence. [W]e conclude that the doctrine of superseding cause no longer serves a useful purpose in our jurisprudence when a defendant claims that a subsequent negligent act by a third party cuts off its own liability for the plaintiff's injuries. We conclude that under those circumstances, superseding cause instructions serve to complicate what is fundamentally a proximate cause analysis. Specifically, we conclude that, because our statutes allow for apportionment among negligent defendants; see General Statutes § 52-572h; 15 and because Connecticut is a comparative negligence jurisdiction; General Statutes § 52-572o; the simpler and less confusing approach to cases, such as the present one, where the jury must determine which, among many, causes contributed to the plaintiffs' injury,

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[6] A position shared by other jurisdictions as well. See e.g., Von Der Heide v. Commonwealth of Pennsylvania, 553 Pa. 120, 718 A.2d 286, 289 (Pa. 1998)(holding "a superseding cause was not present in this case because there was never a third party or event to be considered beyond the conduct of the defendant and the plaintiff."); Brooks v. Logan, 127 Idaho 484, 903 P.2d 73 (Idaho 1995)(superseded by statute on other grounds); Sumpter v. City of Moulton, 519 N.W.2d 427 (Iowa Ct. App. 1994); Roggow v. Mineral Processing Corp., 894 F.2d 246, 248 (7th Cir. 1990); Laney v. Coleman Co., Inc., 758 F.2d 1299, 1305-06 (8th Cir. 1985); Vasina v. Grumman Corp., 644 F.2d 112, 114-16 (2nd Cir. 1981).

is to couch the analysis in proximate cause rather than allowing the defendants to raise a defense of superseding cause.

[T]he fact finder need only determine whether the allegedly negligent conduct of any actor was a proximate cause, specifically, whether the conduct was a substantial factor in contributing to the plaintiff's injuries. If such conduct is found to be a proximate cause of the plaintiff's foreseeable injury, each actor will pay his or her proportionate share pursuant to our apportionment statute, regardless of whether another's conduct also contributed to the plaintiff's injury. Put differently, the term superseding cause merely describes more fully the concept of proximate cause when there is more than one alleged act of negligence, and is not functionally distinct from the determination of whether an act is a proximate cause of the injury suffered by the plaintiff. We find this latter approach, that the doctrine of superseding cause is, in essence, a determination regarding proximate cause or causes, persuasive and hereby adopt it in our case law.

Thus, the doctrine of superseding cause no longer serves a useful purpose in our negligence jurisprudence. Historically, the doctrine reflects the courts' attempt to limit the defendants' liability to foreseeable and reasonable bounds. (internal citation omitted). In this regard, the doctrine of superseding cause involves a question of policy and foreseeability regarding the actions for which a court will hold a defendant accountable. This aspect of superseding cause is already incorporated in our law regarding proximate causation. As some commentators have noted, however, the doctrine was also shaped in response to the harshness of contributory negligence and joint and several liability. See T. Christlieb, "Why Superseding Cause Analysis Should Be Abandoned," 72 Tex. L. Rev. 161, 165-66 (1993). Under this reasoning, in order to avoid what some courts determined was an undue burden on the plaintiff under contributory negligence regimes, courts developed certain ameliorative doctrines, which identified some aspect of the defendant's negligent act that served as a basis for shifting the plaintiff's negligence to the defendant so that the plaintiff could recover for his losses. Id. at 165. Thus, the courts sometimes labeled a defendant's negligence as an intervening act that cut off any contributory negligence of the plaintiff, which, had it not been superseded by the defendant's negligence, would have constituted a total bar to recovery. Id.

We conclude that this aspect of the doctrine of superseding cause has no place in our modern system of comparative fault and apportionment. We agree with the author of the previously cited note that it is inconsistent to conclude simultaneously that all negligent parties should pay in proportion to their fault, as § 52-572h requires, but that one negligent party does not have to pay its share because its negligence was somehow "superseded" by a subsequent negligent act. See id., at 181. We also find

> persuasive the author's criticism of the Restatement (Second) method; see 2 Restatement (Second), Torts §§ 442 through 453, pp. 467-91 (1965); which looks to the nature of the subsequent negligent act to determine whether it somehow supersedes the previous act. T. Christlieb, supra, 72 Tex. L. Rev. at 184. This approach gives undue prominence to the temporal order of the allegedly negligent acts. As the author aptly notes, causal contributions do not operate in neat temporal sequences; rather, most events, such as the events giving rise to the plaintiff's injury in the present case, result from a convergence of many conditions. Id. at 185. The Restatement (Second) approach, then, has the potential of misleading the fact finder regarding the determination of whether each allegedly tortious act is a proximate cause of the plaintiff's injury by placing too much emphasis on the timing of the acts.
>
> Moreover, it is no longer necessary to utilize doctrines that aid fact finders in making policy decisions regarding how to assign liability among various defendants and the plaintiff because those decisions already are inherent in our modern scheme of comparative negligence and apportionment. Thus, under the approach we adopt herein, the question to be answered by the fact finder is whether the various actors' allegedly negligent conduct was a cause in fact and a proximate cause of the plaintiff's injury in light of all the relevant circumstances. If found to be both, each actor will be liable for his or her proportionate share of the plaintiff's damages.

Barry v. Quality Steel Prods., 820 A.2d at 265-269. Following New Mexico's lead in Torres, and on precisely the same legal grounds, the Supreme Court of Connecticut ultimately struck down the doctrine of intervening and superseding cause and remanded the case for a new trial.

The Appellant submits the wealth of case law highlighted above is persuasive. Accordingly, this Court should follow the lead as set out by these other jurisdictions and abolish Kentucky's doctrine of intervening and superseding causation in light of comparative negligence. As explained in Barry, "the rationale supporting abandonment of the doctrine of superseding cause outweighs any of the doctrine's remaining usefulness in our modern system of torts." Barry v. Quality Steel Prods., 820 A.2d at 271. The same could be said, and in fact *should* be said, in Kentucky. The doctrine, in this era, serves

little purpose other than to unnecessarily complicate consideration of proximate causation, while risking jury confusion in allocating fault among the parties. Most importantly, the doctrine's continued use makes little sense, and is wholly incompatible, under a system of comparative fault where any negligent party will be held responsible *only* for their allocated share of fault.

Under comparative fault, and as applied herein, if a jury determines the Appellees were a proximate cause of Appellant's injuries, they will only be held liable for their allocated share of damages, regardless of other acts, *including* Stephen's decision to take his own life, which also contributed to Appellant's injuries. This is a fair approach, a balanced approach, an approach that makes good legal sense and, most importantly, an approach well-reflective of modern tort considerations, assessment of proximate causation, and allocation of fault under comparative negligence principles. Reiterating the concept of proximate cause in a separate instruction on independent intervening and superseding causation would result in a jury inadvertently applying contributory negligence. In the present case, applying *contributory* negligence is what the trial court essentially did when it entered summary judgment, effectively penalizing Stephen regardless of the Appellees' breach of care, absolving the Appellees of any liability in the process, and taking questions of fact and allocation of fault away from the jury. In short, the doctrine of intervening and superseding cause should be declared abolished in Kentucky, and this matter remanded for trial so that a jury may properly allocate fault using comparative negligence.